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In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 684

EASTERN COAL CORPORATION,
Petitioner,

v.

MARGIE RELIFORD, Administratrix of the Estate of Henderson G. Reliford, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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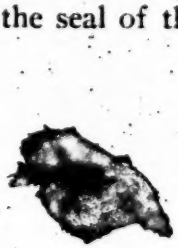
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petitioner, Eastern Coal Corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this court to review the decision



of the United States Court of Appeals for the Sixth Circuit rendered on June 26, 1958, in connection with which a petition for rehearing was denied on November 10, 1958, and which by a divided court reversed a judgment of the United States District Court for the Eastern District of Kentucky dismissing the respondent's complaint on the merits.

REPORTS

a. The District Court's opinion is reported as Reliford v. Eastern Coal Corporation, 149 F. Supp. 778. The opinion of the Court of Appeals rendered June 26, 1958, and the dissenting opinion as well as the further opinion of that Court and dissenting opinion rendered on November 10, 1958, upon the petition for rehearing, are reported in 260 F. 2d 447, December 29, 1958, Advance Sheet.

JURISDICTION

b. i. The judgment sought to be reviewed was entered and dated June 26, 1958. The petition for rehearing was denied and order entered accordingly on November 10, 1958.

ii. On July 16, appellee's time for filing petition for rehearing was extended to August 29, 1958. The petition for rehearing was filed August 20, 1958. The petition for rehearing was denied November 10, 1958.

iii. The jurisdiction of this court is invoked under U. S. C. Title 28, Section 1254.1.

QUESTIONS PRESENTED

c. i. May an appellee, on petition for rehearing to affirm a judgment below which was based primarily upon state law, properly take a position different from that taken on argument and presentation of the case when it appears that after argument and presentation of the case there was a decision by the state court of last resort changing an important rule of state law and making appellee's new position for the first time available to it?

ii. Is there any substantial breach by the employer of a Wage Agreement providing for Workmen's Compensation coverage as to occupational disease (silicosis) where to obtain such coverage the statute required joint action by employer and employee but the state court of last resort ruled just prior to the decision of this case that the execution of the Union Contract is as to the employer tantamount to its statutory election?

iii. Can the employee seek damages for failure to comply with the contract where he does not avail himself of the grievance remedies provided by the contract?

iv. In view of the ruling of the Court of Appeals of Kentucky in Dick v. International Harvester Company, 310 S. W. 2d 514, that the employer had, in effect, elected, can the employee maintain an action in the courts without having first exhausted the administrative remedy before the Workmen's Compensation Board and the appeals allowed from the rulings of that Board?

v. Could the respondent on appeal rely upon an alleged failure to perform the contract where as plaintiff in the

trial court he neither alleged such failure nor alleged or proved any detriment from such failure?

KENTUCKY STATUTES

d. Chapter 342 of the 1948 Edition of Kentucky Revised Statutes, page 2375, contains the Workmen's Compensation Act as same was in force during the period of the decedent's employment herein involved.

KRS 342.015, page 2377, provides that where an employer and employee have both elected to act under the Compensation Act the employee shall be entitled to its benefits but no more.

KRS 342.390, page 2398, shows how the election is to be made generally by the employer.

KRS 342.395, page 2399, until June 19, 1952, and KRS 342.400 fixed the method of election by the employee and gave directions for the preservation of the papers.

KRS 342.395 as amended in 1952, effective June 19, 1952. did away with the necessity for actual election by the employee and required notice of non-election if that were his choice. (1953 Statutes, page 2645).

KRS 342.005, page 2377, defined the nature of the business and the nature of the accident to which the act applies. Occupational diseases generally were excluded and as to silicosis this statute required that in order to obtain silicosis coverage under Workmen's Compensation the employer and the employee were to submit a joint voluntary application in writing to the board.

KRS 342.270 (1), page 2392, requires that application for adjustment of claims shall be filed within one year after the accident or within one year after cessation of voluntary payments.

KRS 342.316 (2), page 2394, requires that the claim for silicosis must be made within three years from the last injurious exposure.

KRS 342.270, page 2392, provides for application to the Board for adjustments.

KRS 342.275, page 2392, requires the Board to make its award.

KRS 342.285, page 2392, gives either party the right to appeal to the Circuit Court.

KRS 342.290, page 2393, provides for appeals to the Court of Appeals of Kentucky.

Each section of the statute is set out verbatim in the appendix hereto.

STATEMENT OF THE CASE

e. This case turns primarily upon the law of Kentucky but involves substantial federal questions. The action is based upon a wage agreement national in scope and has more than local importance. In it the Court of Appeals, it is submitted, has decided an important State question in a way in conflict with applicable State law, and has decided both procedural and substantive federal questions in a way in conflict with applicable decisions of this Court.

The petitioner operates coal mines in Pike County, Kentucky. The bargaining agent of its employees is the United Mine Workers of America. The contract between the Union and the operators provided, among other things:

> "Each operator who is a party to this agreement will provide the protection and coverage of the benefits under Workmen's Compensation and occupational disease laws, whether compulsory or elective, existing in the States in which the respective employees are employed. Refusal of any operator to carry out this directive shall be deemed a violation of this agreement. Notice of compliance with this section shall be posted at the mine."

It so happens that this requirement as to occupational disease was overlooked by both the mine workers and the operators. Everybody had complied as to compensation generally. (55a, 61a). Nothing was done by the operator, the union, or the individual miner to comply with the statutory requirements as to coverage for occupational disease (silicosis). KRS 342.005 (1948) 1c. Rearranging that statute but without any change in the words, we have this simplification of its requirements:

> Any employers and employees may, with respect to the disease of silicosis caused by the inhalation of silica dust, subject themselves, as to such disease, to the provisions of this chapter by joint, voluntary application to the Board in writing for such period as may be stated in the application which shall be irrevocable during such period and effective thereafter until a written revocation be filed with the Board or the employment be terminated.

Reliford left the employment June 28, 1951 (23a, 33a). A few months later he was advised by physicians that he had silicosis.

He got in touch with Mr. E. H. Gibbs, the Union representative who was to negotiate with Eastern for benefits. He was examined a number of times by different physicians, most of them at the instance of the Union and by one at the instance of Eastern and with conflicting reports. On October 23, 1952, Eastern's representative wrote E. H. Gibbs, Reliford's representative, that he could not pay the claim. (51a) The claim was not prosecuted in any way thereafter until Mr. Gibbs wrote Eastern again on March 2, 1955, in which he refers to an offer of settlement made in March, 1952, "on a 25% disability to the body as a whole." (44a)

Reliford got in touch with counsel at Pikeville, Kentucky, who made inquiry of the Secretary of the Workmen's Compensation Board as to the silicosis coverage of Eastern. By letter dated March 1, 1952, (61a) Eastern had informed the Workmen's Compensation Board of its desire voluntarily to subject itself to provisions of the Workmen's Compensation law with respect to the disease of silicosis, but that law as then construed made that coverage available only upon the joint voluntary application of the employer and the employee, and since there had been no such joint application the Secretary advised counsel for respondent that there was no such coverage for silicosis.

Early in March, 1956, (30a) Reliford filed this action against Eastern claiming failure on the part of Eastern to provide him with compensation coverage for silicosis

and that by reason thereof he had been unable to present his claim to the Workmen's Compensation Board of Kentucky and accordingly wanted to recover as much as the Board would have allowed him.

By its motion to dismiss Eastern raised the failure of the plaintiff to exhaust his administrative remedy by application to the Workmen's Compensation Board, (13a). By the third defense in its answer Eastern raised the necessity for an election by Reliford, (15a). By the fourth defense Eastern relied on plaintiff's failure to avail himself of the grievance machinery provided in the Union contract, (18a).

The district court after hearing dismissed the complaint on these grounds (77a, 89a, 149 F. Supp. 778):

(a) He had not availed himself of his administrative remedy before the Workmen's Compensation Board, (82a-85a).

(b) Reliford was barred because the statute required joint and simultaneous acceptance of the silicosis provisions and Reliford had done nothing to join, (85a-89a).

Shortly after the entry of the judgment on March 26, 1957, Reliford died—the record is silent as to the cause of his death—and on April 23rd his action was revived in the name of his widow as administratrix and the appeal was prosecuted in the Court of Appeals for the Sixth Circuit.

The Court of Appeals by a divided court reversed the District Court. After the appeal had been argued in the

Court of Appeals on February 3, 1958, the opinion of the Court of Appeals of Kentucky in *Dick* v. *International Harvester Company*, 310 S. W. 2d 514, 37c, was published in the advance sheets. That opinion held that the mine owner by the execution of this contract had in effect elected to give the silicosis coverage. This opinion was brought to the attention of the Court of Appeals in brief memorandums by both parties, first submitted by the appellant. After the opinion of June 26th Eastern filed a petition for rehearing insisting that under that opinion and the Dick case both Eastern and Reliford had for all practical purposes accepted the silicosis coverage and further insisting that it was incumbent on Reliford to exhaust his administrative remedy before the Board as a condition to the commencement of this action. Because the decision in the Dick case changed the Kentucky law as to the manner in which Workmen's Compensation coverage for silicosis might be obtained petitioner had to abandon the no longer tenable position it had taken in the trial court and when this case was argued and submitted on appeal, and in its petition for rehearing argued the rule adopted in the Dick case as the controlling state law. The majority of the Court of Appeals held that petitioner could not be permitted so to change its position.

The petition for rehearing was denied by a divided court. There was a majority memorandum (50) and a dissenting opinion (54). We think the majority opinion was in error in the expression that the argument of the appellee on petition for rehearing based upon the new announcement of the Kentucky Court ought not to be considered.

JURISDICTION

f. This action was commenced in the United States District Court for the Eastern District of Kentucky by H. G. Reliford, a citizen of Kentucky, against Eastern Coal Corporation, a West Virginia corporation, in which the plaintiff sought to recover an amount in excess of $3,000.00 exclusive of interest and costs. His claim was for $19,000.00. The jurisdiction of the District Court was based on USC Title 28, Section 1332.

ARGUMENT

g. The sections of the statute dealing with the election of employer and employee to operate under the compensation act are set out in the appendix (20 to 31). Because of some unusual provisions in the Constitution of Kentucky the validity of the compensation act was in great doubt. The freedom of the employee to accept or reject its benefits instead of his common law rights was given very serious attention by the Court of Appeals before the act was sustained, *Greene* v. *Caldwell*, 170 Ky. 571. The respondent accepted the traumatic provisions of the act (not silicosis) by signing a compensation register, and this was required until a new generation did away with it by the act of 1952. (1953 KRS 342.395)

i. *The election to work under the Act.* Under the act what is required to give the mine owner and the employee the protection of the Kentucky Workmen's Compensation Act is a matter of Kentucky law. The Kentucky law is based on the Kentucky Statutes as construed by the Court of Appeals of Kentucky.

The Union Contract required the employer to give this protection. The statute which required the joint application of the parties must necessarily be read into the contract and become a part of it. Prior to the decision in *Dick* v. *International Harvester Company,* 310 S. W. 2d 514, (Ap 59), the recognized law of Kentucky required joint affirmative action by the employer and the employee to obtain the benefits of the Workmen's Compensation Act in respect to silicosis. Memorandum opinion of the District Court, 77a, 87a. It was failure on the part of the employer to go forward with such action that the Court of Appeals held to be an actionable breach of the contract. June 26, 1958, opinion, 6b-7b. In *Dick* v. *International Harvester Company,* 310 S. W. 2d 514, the Kentucky Court held that under this provision of the Union contract the mine owner had in effect elected to give the compensation coverage for silicosis; that the employee had the right to reply upon the commitment in the contract as an election on the part of the mine owner to give the coverage.

Accordingly, there was no breach of the contract by the employer. It was as effectively covered for silicosis as if it had formally executed every paper required by the rules of the Board. In the Dick case the Court of Appeals went on to say, "In making it (the Union contract) the Union was the authorized agent and representative of its members and all parties are bound by it." The court had said that the employer was bound. Mutuality of obligation is the bed rock of contract law. If this contract is an election by the employer it is, also, an election by the employee.

If perchance Reliford did not elect by virtue of the contract, Eastern certainly had. If anything further remained

to be done it had to be done by Reliford and he, acting alone, could have made his own election.

The two opinions of the Court of Appeals of the Sixth Circuit indicate that that court felt that Reliford had the right to make the election after his retirement in 1951. If the Court of Appeals was correct in this, then Reliford could have made his election at any time and could then have sustained his claim before the Board.

The company had elected. Reliford had the right to elect, so that there was no breach in practical effect and nothing to prevent Reliford from prosecuting his claim before the Board.

We submit that the decision of the United States Court of Appeals is in conflict with the Kentucky law on this important Kentucky question.

When the Kentucky Court of Appeals decided the Dick case so as to change the rule of law controlling the manner in which Workmen's Compensation coverage for silicosis might be had, petitioner attempted to apply the rule as newly stated to the facts and issues in this case and in its petition for rehearing urged that upon the Court of Appeals. The Court's interdiction of that shift in position (majority memorandum on petition for rehearing, 50) it is submitted, conflicts with applicable decisions of this court. *United States* v. *American R. Exp. Co.*, 265 U. S. 425, Justice Brandeis: "* * By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."

See also *Letulle* v. *Schofield*, 308 U. S. 415: "A respondent or an appellee may urge any matter appearing in the record in support of a judgment," and *Jaffke* v. *Dunham*, 352 U. S. 280: "A successful party in the District Court may sustain its judgment on any ground that finds support in the record."

Cold Metal Process Co. v. *McLouth Steel Corp.*, 6 Cir., 126 F. 2d 185, 189: "Appellee may urge or the appellate court *sua sponte* may consider any theory, argument or reason in support of a decision of a lower tribunal regardless of whether or not it applied that theory."

ii. *Grievance remedies under Union Contract.* The contract sets out how grievances arising under the contract are to be adjusted. (18a and 19a). After setting out three steps for negotiation, step four is by hearing before a Board composed of four members, two from the mine workers and two from the operators.

Step five provides that where they fail to agree the matter in dispute is submitted to an umpire, to be agreed upon by the parties affected. Had there been a refusal by Eastern to grant this coverage the respondent through the Union could have submitted the matter to a Board for hearing and then to an umpire. If Eastern had refused to participate in such arbitration proceedings the Union could have compelled it to participate. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448. The failure on the part of Reliford and his union to take advantage of these grievance steps is, we submit, a legal bar to the maintainance of the present action. The Kentucky

rule is that such steps must be followed before suit can be commenced. *Tharp* v. *L. & N. Railroad Co.*, 307 Ky. 322, 325.

Where the state law requires the use of the grievance machinery, an action can not be maintained in the Federal Courts under such a contract, touching commerce, in the absence of the exhaustion of the grievance proceedings. *Transcontinental and Western Air, Inc.* v. *Koppal*, 345 U. S. 653.

We submit that this federal question has in effect been decided in a way in conflict with the applicable decisions of this court.

iii. *Exhausting Administrative Remedy.* The statute KRS 342.270 gives every injured employee the right to make an application to the Board for an adjustment of his claim. 342.275 requires the Board to make an award after hearing. 342.285 gives either party the right of appeal to the Circuit Court and 342.290 gives an appeal to the Court of Appeals. This course was pursued by Dick in *Dick* v. *International Harvester Company*, 310 S. W. 2d 514. The coal mine employee there, suffering from silicosis, sustained his claim in the Court of Appeals.

This administrative remedy was open to Reliford. He failed to file an application for adjustment of his claim. His attorney wrote the Secretary of the Board and got an adverse reply. But writing a letter to the Secretary of the Board is not exhausting the administrative remedy.

He could make formal application to the Board and

prove the union contract, the agreement by the mine operator to give compensation coverage for silicosis. If unsuccessful there he could appeal to Circuit Court, a court of general jurisdiction, and then to the Court of Appeals of Kentucky where he has an appeal as a matter of right. He took none of these steps.

It was necessary for him to exhaust the administrative remedy before commencing his action.

Myers v. *Bethlehem Ship Building Corporation*, 303 U. S. 41,

United States v. *Jones*, 336 U. S. 641,

Federal Power Commission v. *Arkansas Power & Light Company*, 330 U. S. 802,

Dalton Adding Machine Co. v. *State Corporation Commission*, 236 U. S. 699.

We submit that the decision of the Court of Appeals is in conflict with the applicable decisions of this court.

iv. *Posting Notice Immaterial.* The contract does require that a notice of compliance with the Workmen's Compensation section of the agreement be posted. The contract says, "Notice of compliance with this section shall be posted at the mine." (78a) The only time, however, that this last sentence of the paragraph appears in the printed record in this case is where the District Court quoted the whole paragraph in his memorandum. (78a) In plaintiff's complaint (10a) the paragraph is quoted down to this point

but the sentence about posting notice is omitted. There is no allegation in the complaint about any posting of a notice of compliance or any failure to post such a notice. The only testimony on the subject is on page 46a and it is entirely inconclusive and does not even show that such a notice was not posted. There is no claim in the plaintiff's complaint that such notice was not posted. There is no claim in the complaint and there is no claim in the evidence that Reliford was prejudiced in any manner by failure to post the notice. The correspondence between Eastern and Gibbs of the Mine Workers in connection with a possible adjustment is apparently all based on the assumption that Reliford's claim of silicosis was covered under the Workmen's Compensation Act. Gibbs writes Eastern in this language: "Possible settlement in this case on a 25% disability to the body as a whole." (44a) These are terms used in Workmen's compensation matters. When people settle compensation cases they settle them on the basis of disability. When they settle personal injury claims they settle on the basis of dollars and cents. It is clear from the record that these negotiations in March, 1952 were based on the assumption that Eastern was carrying compensation for silicosis. If Reliford and his adviser, Gibbs, understood that Eastern was carrying compensation, Reliford has sustained no prejudice by reason of Eastern's failure to post such a notice.

In the trial court and on appeal the respondent's case rested upon the claim that petitioner breached the contract by failing to provide Workmen's Compensation coverage for silicosis. Down to the decision of this case by the Court of Appeals no breach of the contract had been claimed and no right had been asserted by reason of the employer's

failure to post notice of compliance. Yet, according to the final majority opinion of the Court of Appeals, liability for breach of the contract is based upon this failure to post the notice.

We submit that the majority opinion in connection with posting the notice is based on a misunderstanding of the record.

CONCLUSION

This petition is submitted because we feel that the court below has failed to follow what appears to be the reasonably plain ruling of the Court of Appeals of Kentucky in the case of *Dick* v. *International Harvester Company*. It is interesting to note that this case was considered by four judges, two circuit judges and two district judges. One of the district judges is a Kentucky lawyer. One of the circuit judges is a Kentucky lawyer. Both of these Kentucky lawyers were in agreement that under the Kentucky law the plaintiff had no case. The circuit judge and the district judge who took the opposite view, while having long and splendid experience as judges, have not had similar experience with the Kentucky law. In ordinary cases this court accepts the judgment of the local circuit on the state law and in a good many of the circuits the Court of Appeals accepts the judgment of the district court on the state law.

The opinions of this court in *King* v. *United Commercial Travelers*, 333 U. S. 153, and in other cases show very clearly that this court is always ready to consider decisions on state law which are announced pending the appeal. It

is submitted that on the petition for rehearing the court below did not give to the Kentucky court's opinion in the Dick case the weight it ought to have had.

We respectfully request that the judgment of the Court of Appeals be reversed and that the judgment of the District Court be affirmed.

Respectfully submitted,

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